United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1235

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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P/S

ABDON ACEVEDO, et al.,

Appellants,

-against-

NASSAU COUNTY, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF NASSAU COUNTY APPELLEES

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JJ:qmk

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BRIEF FOR NASSAU COUNTY APPELLEES

STATEMENT

This case involves planning concepts -- not racial antagonisms. The rhetoric of appellants is in terms of racial discrimination, but the substance of all the testimony demonstrates that the issue in this case is merely one involving differences of opinions among the many published or expressed views for the planning of Mitchel Field.

The District Court made a finding of fact with respect to the discrimination issue (page 15 of the Opinion of Judge Mark A. Costantino):

> "In view of all the evidence in this case the court finds that there is no proof of official conduct which has as its purpose the containment of Blacks or which has the effect of denying Blacks rights and opportunities available to whites. The record shows just the opposite." (107-A, Appellants' Appendix)

On pages 19 and 20 of the same Opinion, the Court reinforced this finding as follows:

> "The plaintiffs have failed to meet their burden of proof. The court finds that the preclusion of housing at Mitchel Field does not have a racially discriminatory purpose or effect. The court further finds that the land uses proposed for the development of Mitchel Field have a rational and legitimate governmental purpose, and that there is no invidious discrimination. *Dandridge v. Williams*, 397 U.S. 471 (1970); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Boraas v. Village of Belle Terre*, 476 F. 2d 806 (2d Cir. 1973); see also *Lindsey v. Normet*, 405 U.S. 56 (1972); *James v. Valtierra*, 402 U.S. 137 (1971). Finally, with regard to the proposed construction of 250 units of senior citizen housing at Mitchel Field, what is conceded to be a "token amount", the court finds in light of all the evidence in this case that such actions are not the result of intentional and purposeful racial discrimination." (111-A, 112-A, Appellant's Appendix)

at Mitchel Field which has not been adequately discharged.

In this memorandum, appellees will demonstrate from the record in the lower court that Mitchel Field, which is located in the very central portion of the County, was acquired and should be developed for educational, cultural and civic purposes; and that housing problems, to the extent they exist, can and should be dealt with throughout the County and that County, town and village officials have been active and not passive in achieving this result.

Acquisition of Mitchel Field

The abandonment of Mitchel Field by the Air Force presented the County with the opportunity to acquire land in its geographical center to better serve the needs of a growing suburban community.

Notwithstanding the vision of Nassau County as an entity, it is actually fragmented into two cities, three towns, sixty-four villages, fifty-seven school districts, and a host of special districts, all separate taxing entities. The creation of a core of civic, educational and cultural activities at Mitchel Field was intended to provide a unity to the County and to provide those services which a stable population required.

Mitchel Field consists of the 630.7 acres located in the geographical center of Nassau County bounded by Oak Street, Stewart Avenue, Meadowbrook Parkway and Hempstead Turnpike, and two additional

Appellees urge that the District Court findings were amply supported by the evidence and that there is not a scintilla of evidence to support a contrary decision, or a finding of "suspect class" which would invoke the "compelling interest" test, as opposed to the "rational basis" theory upon which the case was tried and determined. A decision in favor of the appellants would have unnecessarily transferred to the Courts from the Nassau County Board of Supervisors, the legislative body of the County, the legislative power to plan and develop land within the County, and would substitute the judgment of the Court for the judgment of those officials of the County who acquired this land in 1963 and 1968 for then announced purposes which did not include housing. (See Defendants' Exhibits A, B, C, D, E, G and H.)

Such finding would also ignore the legal reality that the County lacks housing or zoning power; the factual reality that the area adjacent to Mitchel Field is integrated with percentages of black population in excess of the County level (see Mr. Purcell's testimony at Transcript pages 1207, 1208 and 1209), and that this population is and was also concerned about the impact of high density housing upon their communities and their local school taxes. A contrary finding would also have to conclude that housing in Nassau County was not a regional problem to be dealt with by the three towns, sixty-four villages and the two cities, but was the unique problem of the County

pieces consisting respectively of 45 acres and 80 acres located on the southerly side of Hempstead Turnpike and on opposite sides of Meadowbrook Parkway. These latter two pieces are frequently referred to as the Santini area. The total area involved in these parcels is approximately 755 acres.

In addition, 370 acres of land was acquired for use by the Nassau Community College and Hofstra University, and is presently used for these educational purposes and that use is not challenged by the appellants.

The 755 acres referred to herein were acquired as follows:

(a) In 1963, 435 acres were acquired at full value for the then announced purpose of creating an educational, cultural and civic center.

(b) In 1967, 45 acres were acquired from the Jones Beach State Parkway Authority in the central core of Mitchel Field just west of Meadowbrook Parkway for park purposes and may not be used for any other purposes.

(c) In 1968, 66.9 acres of land were acquired at a reduced price for the specific purpose of creating a park and recreational facility. The deed specifically provides that title reverts to the United States Government in the event the County does not use the land for that specific purpose.

(d) An additional 83.1 acres were acquired at the same time for the announced purpose of encouraging industrial development. This land is zoned "industrial" and is located in the northwest quadrant of Mitchel Field adjacent to a railroad siding and suited for the purpose for which it was acquired.

As may be expected, the acquisition of this land generated a large variety of proposals for its use which in sum would have occupied more land than was available. The testimony introduced by the respective parties at the trial clearly indicated that those purposes to which the County has committed some of the land and for which it proposes to commit the remainder of the land do constitute a rational use of the land consistent with the recommendations made by every planner who commented upon its use. The issue therefore is not whether the County in the development of the field is misusing the property, but whether, notwithstanding its rational use of the land, it should alter its priorities and goals to provide multi-family housing for all economic groups.

The County's proposals do provide for the construction of 250 units of low income senior citizen housing through the Town of Hempstead.

Appellants urge, however, that this is not a sufficient commitment to meet the housing needs of the County, and that since Mitchel Field is the last available piece of land for housing development, it must be committed to the construction of additional housing units.

The testimony at the trial established that Mitchel Field is not the last available land for housing since housing can be established on a scatter-site basis, in the redevelopment of the downtown area of identifiable villages within the County, on land already zoned for apartments which would permit more than 24,000 units, (R. 1423)* upon 100 acres of Roosevelt Raceway land, (R. 1426), upon the more than 1,000 acres available at the Port Washington sandpits, (R. 1429), and in the estates now being offered for sale to developers.

The Trial Judge made a finding consistent with these facts when he wrote:

> "Finally, considering the availability of land throughout Nassau County that could be used to construct multifamily housing and the suburban character of the communities within the County there is no basis to support a finding that the construction of high-rise apartments at Mitchel Field is essential to the existence of low-income family housing in Nassau County."

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* (R.) refers to the transcript page number as noted at the top of each page.

Proposed Uses of the Available Land

The County has, by a series of announcements, and by the testimony in this case, indicated the manner in which it proposes to to develop the subject area. Each of these recommendations is consistent with proposals previously made, and during the course of the trial were deemed by the witnesses presented by both sides to be a rational use of the land. The specific items, the source material, and witnesses who supported them are set forth as follows:

a) Senior citizen housing (low income) in the Santini area, 250 units - Recommended by witnesses Arthur Kunz, Eugene Nickerson, John Follis, Ralph G. Caso, Francis T. Purcell, Henry Liu; reports and documents offered into evidence - Regional Plan Association Report entitled "A New Center for the Suburbs" issued April 1965, Nassau Center Report dated 1966 prepared by the Nassau County Planning Commission, Mitchel Field Development Corporation report entitled "Nassau Center" dated 1969, Bi-County Master Plan, and Nassau County Comprehensive Plan dated December 1971.

b) 25 acres to preserve the Hempstead Plains in their natural state - Recommended by witnesses Dr. Robert Johnson, John Follis, Arthur Kunz, Eugene Nickerson, Ralph G. Caso.

c) A central reference library - Recommended by witnesses Eugene Nickerson, Arthur Kunz, John Follis, Ralph G. Caso and Henry Liu; Reports - Welton Becket, Nassau Center Report dated 1966 prepared by the Nassau County Planning Commission, Mitchel Field Development Corporation

report entitled "Nassau Center" dated 1969, Marcom, Nassau County Comprehensive Plan dated December 1971.

d) A hotel - Recommended by Witnesses Arthur Kunz, Eugene Nickerson, John Follis, Henry Liu, and Ralph G. Caso; Reports - Nassau Center Report dated 1966 prepared by the Nassau County Planning Commission, Marcom, Mitchel Field Development Corporation report entitled "Nassau Center" dated 1969, and Nassau County Comprehensive Plan dated December 1971.

e) A new police precinct - Recommended by witnesses Arthur Kunz, Eugene Nickerson, Ralph G. Caso, Henry Liu and John Follis.

f) School for the Handicapped - Recommended by witnesses Arthur Kunz, John Follis, Eugene Nickerson, and Ralph G. Caso; Reports - Nassau Center Report dated 1966 prepared by the Nassau County Planning Commission, Mitchel Field Development Corporation report entitled "Nassau Center" dated 1969, Marcom, and Nassau County Comprehensive Plan dated December 1971. Here, also, while the references are not specifically to a school for the handicapped, the suggestions and recommendations are that the area be used in part for educational purposes.

g) Maintenance facilities for the County's newly acquired bus transportation system - Recommended by witnesses Eugene Nickerson, Arthur Kunz, John Follis, Henry Liu; Reports - Nassau Center Report dated 1966 prepared by the Nassau County Planning Commission, Mitchel Field Development Corporation report entitled "Nassau Center" dated 1969 and Marcom.

h) 66.9 acres to be developed as a park, per the requirements of the deed from the United States government to Nassau County - All witnesses and all reports have unanimously endorsed the use of the area for park and recreational purposes. This area, especially due to the deed reserictions which limit it, can only be used as a park.

i) 45.7 acres to be developed as a park, per the requirements of the deed from the Jones Beach State Parkway Authority to Nassau County - All witnesses and all reports have unanimously endorsed the use of the area for park and recreational purposes. This area, especially due to the deed restrictions which limit it, can only be used as a park.

j) Concert hall - This use was approved of and supported by all witnesses who testified and all reports and studies offered into evidence.

k) Theatre - This use was approved of and supported by all witnesses who testified and all reports and studies offered into evidence.

l) Technical and trade school - Recommended by witnesses Eugene Nickerson, Arthur Kunz, John Follis and Ralph G. Caso; Reports - All reports recommended that Mitchel Field be used for educational purposes.

m) Solid waste recycling plant to be constructed by the Town of Hempstead - Eugene Nickerson, Arthur Kunz, John Follis, Henry Liu and Ralph G. Caso.

n) Commercial and industrial buildings to produce ratables in the Santini area and in Northwest Quadrant - Recommended by witnesses Eugene Nickerson, Arthur Kunz, John Follis, Henry Liu and Ralph G. Caso;

supported by all witnesses who testified and all reports except Welton Becket, which did not deal with this area inasmuch as at the time the Welton Becket report was prepared, the County then owned only 435 acres, aside from that acreage held for use by the Nassau Community College, and the report suggested only the civic and cultural uses and left no room for other development.

o) Federal and County office complexes - Recommended by witnesses Eugene Nickerson, Arthur Kunz, John Follis, Henry Liu and Ralph G. Caso; supported by all witnesses who testified and all reports except Welton Becket, which did not deal with this area for the reason cited above in paragraph (n).

Nassau County Profile

Nassau County consists of 290 square miles with a population of 1,428,838 as of 1970 (1397), and consists of the cities, towns and villages referred to above. There were 65,679 blacks residing within the County at the time of the last census in 1970, and they constituted 4.6% of the population (R. 322). Less than ½% of the total population have Spanish sounding surnames.

From 1960 to 1970 there was a greater increase in non-white population than in white population (R. 1394), and there was also an increase in black home ownership to 55.4%, or a raw numerical increase of 5400 units owned by non-whites in the period 1960-1970 (R. 1395).

Although the appellants claim that there are racially impacted areas and that these areas present the greatest housing problems, the evidence is to the contrary. The target areas for this testimony were

Freeport, Hempstead Village, Roosevelt, Inwood and Elmont.

Mr. John Follis, Deputy Director of the Nassau County Planning Commission, testified that each of the areas (R. 1398, 1401, 1402 and 1405) were racially integrated, consisting primarily of one-family dwellings which were essentially in very good shape. He pointed out that a field survey conducted in March 1972 (1399) found 3129 sound houses, 70 in declining condition, 50 in deteriorating condition and only 16 which were delapidated.

In Freeport, for example, which is alleged to be racially impacted, the blacks constitute less than 20% of the total population (R. 1401), and the houses are esentially one-family with the exception of some garden apartments and several urban renewal projects. In describing the community, Mr. Follis said that it was essentially in very good shape (1402).

Hempstead Village is also characterized as a racially impacted area and presumably urged upon the Court by the appellants as one of the examples of the deterioration of housing which compels action by the Court. However, testimony indicates (1402) that Hempstead is 67.19% white, it has a very substantial central business district, that the village has been redeveloped (1403) with seven-story apartment houses, commercial and governmental facilities, and is retaking its position as a prime retail center in the County. Mr. Follis said that the area was not blighted.

Long Beach, referred to in the testimony of Mr. Kunz as having one of the greatest housing problems, is 92.8% white (R. 1405), has a large senior citizen population, an urban renewal project (R. 1405), and has the highest density for single family and apartment dwelling units in the County (R. 1404). Nothing in the record describes it as a blighted area and a physical inspection would indicate to the contrary.

Inwood is 76.01% white (R. 1405), has an urban renewal project (R. 1406) and is not a blighted area (R. 1407).

Both Mr. Follis and James M. Shuart, who was then the Commissioner of Social Services in Nassau County, testified that welfare was not just a black problem, but one that involved all ethnic groups. Commissioner Shuart testified (R. 536) that there were 22,891 welfare cases involving 52,281 individuals, and that more than one-half of the cases, 51.5%, or 26,925 people, were white. Mr. Follis pointed out that the City of Long Beach had the heaviest concentration of welfare cases with 3144 (R. 1409, Defendants' Exhibit BB), but that the larger number of these cases in that community were senior citizens and white.

A pilot study of housing accommodations in which welfare recipients resided in the City of Long Beach indicated that only 1.6% of them were considered substandard (R. 554).

The Nassau-Suffolk Planning Commission report on overcrowding in 16 counties and New York City (Plaintiffs' Exhibit 10) showed that the least overcrowding in each of these areas was in Nassau County. Nassau County had fewer overcrowded units than Suffolk County, Westchester

County or any of the other counties surrounding the New York City area (R. 361, 362).

The record further showed (R. 1415) that family incomes had shown a marked improvement in the areas which in 1960 had been considered poverty areas. Only one census tract had shown an increase in poverty level incomes. The unemployment rate in Nassau County in 1972 and in the first quarter of 1973 was consistently lower than that of the New York Standard Metropolitan Statistical Area rate (Defendants' Exhibit FF).

THE EVIDENCE

The appellants introduced no evidence of any purposeful discrimination, nor did they submit any evidence which would indicate a discriminatory effect as against any ethnic group.

The entire approach of the appellants was to build inference upon inference, a procedure never allowed under the rules of evidence, in the hope that a conclusion could be drawn which would give credence to their complaint.

The witnesses produced by the appellants testified as to their own version of the profile of Nassau County, their own version of the housing needs, and their own plans for the solution of the problem. No single witness testified that there was a deliberate plan on the part of any municipality within the County to limit or refuse construction of multi-family units for the sake of excluding any ethnic or economic group.

On the other hand, S. William Green, Regional Administrator of the U.S. Department of Housing and Urban Development, whom appellants called as a witness and upon whom they relied to support their case, testified on cross-examination as follows (R. 976):

> "Q. Did you ever attribute any racial overtones to any act by County Executive Caso?
>
> A. No."

Since appellants claim a reversal of policy by the present County administration based upon racial considerations, appellees offer the following documented analysis of the record with respect thereto.

This brief has already pointed to the fact that the land in question was acquired in 1963, 1967 and 1968 for specific purposes with 45 acres acquired from the Jones Beach Park Authority and 661 acquired from the U.S. Government for park purposes and therefore not available without an act of the State Legislature and the consent of the grant as for any other purpose.

The 435 acres were acquired for educational, cultural and civic purposes and 83.1 for the announced purpose of encouraging industrial development.

These acquisitions were approved by the County's legislative body, the Board of Supervisors. This Board has not, in the intervening years, allocated any of this land for housing nor has it alienated the land for that purpose.

Section 11-8.0 of the Nassau County Administrative Code[1] requires Board of Supervisors action for the disposition of land, a necessary act to permit construction of housing, since the County is constitutionally prohibited from building housing of any kind.

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[1] Sec. 11-8.0 Authority to dispose of real property. The county may sell, convey, exchange, grant or release any of its real property, apply such real property to a county use other than that for which it was acquired, or lease such property for a period not to exceed ninety-nine years, at public or private sale, and grant rights or interests in, over, under and across any real property in which the county has any right, title, or interest, for such consideration and upon such terms and conditions as the board of supervisors may deem proper. (Amended by Local Law No. 12, 1967, in effect October 13, 1967)

The presumption of continuity which would follow the acquisitions has not been altered by any action which would give support to appellants' claim that there has been a "reversal" of policy.

What has happened is that in the variety of suggestions made for Mitchel Field and in the time frame between acquisition and the present, housing has surfaced as one of the many purposes for which the land may be allocated. But neither the suggestions nor the proposed limitation to 250 units of senior citizen housing was born out of racial considerations.

THE COMMUNITY ATTITUDES

The thrust of appellants' claim is that housing was excluded from Mitchel Field because of the attitude of the involved communities. Appellants then reason that since suburbanites have a "social attitude" about blacks, their motivation was racial discrimination to which public officials pandered in order to win elections.

But this rationale cannot survive an analysis of the population, school problems and activities within this area.

Uniondale

All of Mitchel Field, with the exception of 80 acres in the Santini area east of Meadowbrook Parkway, is in the Uniondale School District. Uniondale is an unincorporated village relying upon special districts, the Town of Hempstead and the County of Nassau for essential services.

Although the black population in the County is only 4.6%, the Uniondale School District has a minority census of 18.8%, of which all but the .8% are black (R. 1338). Uniondale is a well integrated (R. 1340) community of one-family homes. No evidence was submitted to show surface or subsurface tensions, and there is no reason to believe that any such tensions exist.

Uniondale is a unique example of intra-school district busing to maintain some semblance of racial balance within the school system. It involves approximately 160 minority students and has apparently been accomplished without protest, picketing or the unfortunate reactions which have surfaced elsewhere.

Uniondale objects to the creation of housing units in Mitchel Field because it lacks facilities and the tax base to support a substantial increase in the number of children it must educate.

Dr. Robert M. Leifels, called as a witness for the Nassau County defendants, is the Assistant Superintendent of Schools for the Uniondale School District (R. 1301). Uniondale is the school district which encompasses all of Mitchel Field except for that portion known as Santini east of the Meadowbrook Parkway (R. 1316). Mr. Leifels testified that the present school budget was $15,900,000 (R. 1301), that the district was a flat grant district (R. 1302), and the maximum aid therefore was $310 per pupil from the State of New York. The district will be required to raise $11,457,000.33 for the forthcoming school year by local taxation (R. 1303) and as a result, the school tax rate will be $11.58 per $100 of assessed valuation (R. 1305). The cost of educating a child in Uniondale is $2,239 (R. 1303-1304), of which $310 is state aid and $1,929 must be raised locally by taxation (R. 1304).

He further testified that there were nine schools in the district, all operating at maximum capacity (R. 1306), and that an increase of 1100 children would make it necessary to construct new school buildings (R. 1306-1307). 1100 children would cause the tax rate to be increased an additional $2.11 per $100 of assessed valuation without taking into consideration the costs of constructing new buildings (R. 1310-1311).

Dr. Leifels stated that the school board's position was that it was not opposed to children, but rather to large scale housing because of the costs (R. 1312-1313). Finally, in cross-examination, Dr. Leifels stated that the school population was 18.8% non-white (R. 1338) and that the schools in the district were integrated (R. 1340).

Uniondale's opposition to housing was also publicly expressed by members of its black population.

The attempt by appellants to characterize Uniondale as a racist community with undue political influence should not succeed. The opposition of Uniondale to an invasion of some welfare families as squatters into substandard barracks in Mitchel Gardens (no longer part of the County's land at Mitchel Field) does not change the character of that community nor taint its position as a well integrated peaceful village.

East Meadow

This unincorporated village lies east of Meadowbrook Parkway and involves only 80 acres of Mitchel Field. Because of prior development and a proposal to use 10.5 acres for low income senior citizen housing and 6 acres for a Navy Park, only about 50 acres remain for development.

East Meadow wants commercial ratables, not housing. Its position was stated by Dr. Martin Walsh, who testified that he is the Superintendent of Schools of the East Meadow School District, which is the district which serves that portion of the Santini area of Mitchel Field which is west of Meadowbrook Parkway (R. 1352). He testified that the school population was declining, but that the budget was increasing

due to increased costs (R. 1353). The current budget of $27,000,000 was put to a vote by the electorate, as required by law, on June 13, 1973, and was defeated as it had been in the prior two years (R. 1355). Dr. Walsh testified (R. 1357) that in his opinion, the last three budgets were voted down because the taxpayers were dissatisfied with the tax rate increases. The effect of a voter defeat of the budget is to cause a school district to go on an austerity program which means that certain programs such as recreation and athletics must be eliminated.

Dr. Walsh stated the position of the school board to be that they would be happy to educate any youngster who was a resident of the district if the tax base that would represent these youngsters would be equal to the tax base of the district's regularly resident youngsters (R. 1359), and that he had taken the same position at a hearing held by the Mitchel Field Development Corporation in May of 1969.

Moreover, the East Meadow School District, in some of its programs, invites in students from outside the district, many of whom are non-white (R. 1361-1363). Therefore, it is clear that the district does not object to minority children being educated in its schools; in fact, by these programs it encourages minority children to come to the district.

RECOMMENDATIONS OF THE PLANNERS

Appellants assert that the recommendations of various planners and other persons alleging to speak *pro bono publico* should be elevated to the status of a County plan for the development of Mitchel Field and that any determination which excludes some of their recommendations should be regarded as a "reversal" of existing policy tantamount to racial discrimination.

A history of the reports would indicate, however, that they were not uniform, and in some cases were diametrically opposed to each other.

The planners who recommended housing differed among themselves as to the reason, the quantity, the type and the location. Most of them ignored the deed restrictions which made park land unavailable.

The common denominator of the recommendations for Mitchel Field was a range of educational, cultural and civic activities with provision for ratables to ease the local tax burdens and to create job opportunities.

The housing recommendations, when made, generally followed the formula of 70-20-10 -- seventy per cent luxury and middle income housing, twenty per cent low income, and ten per cent senior citizen housing (R. 441).

Recommendations ranged from 176 units to 9400 units, and from one-story construction to garden apartments and high-rise apartments. Area coverage recommendations also covered a wide range of opinions.

It should be noted that 9400 units would produce a city as large as Long Beach and would mean 30,000 residents. The acreage required would preempt the other projects. Only one of these grandiose plans provided for ~~plans~~ schools or other necessary services for this new population.

The decision to give priority in planning to non-housing activities cut across all lines, and by the very mathematics of 70-20-10, affected many more luxury and middle income units than proposed low income units.

Incidentally, no one has demonstrated that financing or required tax abatements are available for low income housing.

Following herewith is an analysis of the major reports to which reference was made in the testimony.

Welton-Becket and Associates

Welton-Becket was engaged by the County in the early days of the development of Mitchel Field and their report recommended the creation of the John F. Kennedy Educational, Civic and Cultural Center (Defendants' Exhibit G) and reads in part as follows:

> "The remainder, a total of 435 acres, was purchased by Nassau County from the Federal Government and has been subdivided as follows:
>
> a) The main parcel, comprising approximately 186 acres, to be allotted to the John F. Kennedy Educational, Civic and Cultural Center which is the subject of this brochure.
>
> b) Parcel 2, comprising approximately 45 acres, to be devoted to an area in a natural setting or park which is to be planned essentially for the educa-

tional enhancement of the children of Nassau County. Facilities located in this area will include a botanical garden, planetarium, children's sculpture garden and arboretum.

c) Parcel 3, comprising approximately 81 acres, will contain the pumping station for a new sewage disposal plant, shops and facilities to house vehicles for the maintenance of the JFK Center, and a presently existing pistol range which is to be reactivated.

d) Parcel 1, comprising approximately 30 acres, is intended as the location of a new Trade and Technical High School."

It is obvious from this report that the plans for the Center, which were pursued by the Nassau County Executive Eugene F. Nickerson, encompassed all available land and made no provision for housing.

Regional Planning Association Report (1965)

In April 1965, the Regional Planning Association issued a pamphlet, "A New Kind of Center for Nassau County," in which they made recommendations for the development of Mitchel Field and an area of 5,000 acres surrounding it. (Exhibit W). The area itself was defined by William Shore, an employee of the association, who testified at the trial as follows:

"The 10 square miles bounded by Franklin Avenue, Stewart Avenue, Salisbury Park, Hempstead Turnpike, including Roosevelt Field, Hempstead, Garden City, Mitchel Field, and Mineola, should be carefully planned to form with what is there a new kind of urban-suburban center."

The entire concept was to create an urban center with high density along and adjacent to the center (p. 1039). The reasons for the recommendations are set forth in the testimony of Mr. Shore as follows:

> "Well, one of the major arguments for concentrating activities as to provide the opportunity for people to get around in a way other than the automobile, by walking and by public transportation. And we pointed out that all of the research available indicated that when you plan a center of jobs and other activities and you relate to them the higher density housing that people will want, then you can cut down the amount of auto travel significantly. You get a high percentage of people walking to work and you get the people needed to support a public transportation system, which moderate density housing and scattered jobs simply will not do."

With respect to this report, it should be noted that the recommendations were not based upon racial considerations but upon a planner's view on how the center would be developed. The recommendation as to housing was not limited to Mitchel Field, and admittedly, much of it could be constructed in the 100 vacant acres of Roosevelt Raceway, which is in close proximity to the Mitchel Field property.

This recommendation to create a residential center must be viewed against the language of another planner, Henry C.K. Liu (R. 640), who states that Mitchel Field is surrounded by a "sea of housing," and the intensity of development should not violate the suburban character (R. 643).

Marcom, Inc. Report (1968)

Marcom was an economic planner, not a physical planner. Its report was an economic feasibility study designed to create 44,000 jobs at Mitchel Field. Its recommendations for housing were based upon the opinion that residential facilities and activities would add an active element to complement other facilities and activities and "would add to the vitality of the Coliseum/Cultural Group".

This plan was not acceptable to Norman Blankman (the prime sponsor of this action), who in fact disagreed with the Marcom Report (R. 1129, 1130, 1131). His disagreement with the Marcom Report was also based upon the Levitt & Sons memorandum, which stated that this Marcom plan was not feasible (Defendants' Exhibit Y).

It should be noted, too, that the plan ignored all but 30 acres of restricted park lands and projects construction in areas not available. Its recommendations for 14-story high-rise structures are the subject of another source of criticism.

John Follis, the Deputy Director of the Nassau County Planning Commission, rejected this type of housing as suitable for low income groups.

> "I believe that in Nassau County, at that low-income housing should be similar to the other people in the county have; that if we are going to build apartments, they should be more of the road (row)-type (sic) housing so that the families have their own open space and backyard, and the density should be that they are not living on top of one another.

> "I think that density, 12 or 14 units in the acre, comparable to what the Town board seems to be doing in private sectors for development, and I think it is suitable for low-income housing.
>
> "I think it is important, particularly in the family units, that these people have the same amenities their counterparts have in the private sections." (R. 1443-4).

Even counsel for the appellants retreated from the high-rise proposal: "We think we are talking about garden apartments and town houses (R. 1447)".

Nassau County Planning Commission (12/31/71)

This report was never submitted to the Nassau-Suffolk Planning Commission for consideration by its members. It was issued on the last day of the term in which the minority party members could serve and control its reports. It must be viewed as a political document. Nevertheless, it hedged on the matter of housing.

It adopted the 70-20-10 formula which would limit low income housing to twenty per cent, and then said:

> 'Although recommendations for housing at Mitchel Field have been as high as 9,400 units, the final determination will be based, to a great extent, on the ability to find suitable housing sites in other areas of the County to meet the projected demand. If sufficient sites are scattered throughout the County, then the need to utilize Mitchel Field is correspondingly reduced."

This report also ignored park restrictions by providing for only 73 acres of conservation and green, although deed restrictions involve two parcels of 66.9 and 45 acres respectively, and another 25 acres are committed to the Hempstead Plains conservation project.

John Follis, the Deputy Director of this Planning Commission since 1969, during his testimony at the trial, stated that he did not regard Mitchel Field as the proper place for the positioning of low income housing. His testimony on the subject reads as follows:

> "Mr. Follis, in view of the history of Mitchel Field, which includes the allocation of 66.9 acres to Mitchel Park; 40 plus covenanted by the Island State Park Commission; 25 acres of land, highly desirable to protected as the Hempstead Plains; the needs of Boces, the Police Department and the Metropolitan Suburban Bus Authority and the needs of the East Meadow School District, to have a more adequate basis, and the capacity problems in Uniondale, do you believe that low-income housing at Mitchel Field is the most desirable land use?"

His answer was no, that low-income housing was not the most desirable use of the land at Mitchel Field.

The Liu Report

Mr. Henry C. K. Liu is an architect and an urban planner who was retained by the Mitchel Field Development Corporation as a consultant to prepare a physical design concept based upon the Marcom Report (R. 599).

It was apparent that the corporation was not satisfied with the Marcom report and required a new development of the suggestions made by Marcom.

Mr. Liu acknowledged (R. 608) that in meetings with the corporation, he suggested that Mitchel Field should not be viewed as an isolated project, but should be developed in terms of its Countywide and community coktext. He testified that "Mitchel Field should not be viewed as a cure-all solution to all of the County's problems."

His position, which was read into the record (R. 641), was as follows:

> "The question of what is proper -- what is the proper role of Mitchel Field in response to the housing needs of Nassau County can only be answered within the larger context of a County-wide housing policy.
>
> "The internal planning considerations of Mitchel Field alone cannot independly provide any intelligent and local basis to the housing problem of the County."

The witness Norman Blankman was also critical of the Liu Report (R. 1133-1134) and suggested an international competition for the purpose of securing a suitable planner.

General Comment on "Plans"

The prior Coukty administration has never made a final determination to proceed with any single plan. This lack of action suggests why the appellants sought in their complaint and upon their argument a decree directing the County to develop "a Master Plan". This request in itself emphasizes the fact that there was no adopted plan, and in the absence of an adopted plan, the repeated suggestions by appellants that the plans were "reversed" by the Caso administration are unfair and inappropriate.

The history of Mitchel Field and the plethora of plans reflect upon the government process in which committee after committee consider things, but do not resolve them.

The County Executive, Ralph G. Caso, has determined to develop Mitchel Field as soon as possible in the interests of the residents of the County, and this suit is but one more effort to thwart development and ultimately make the contemplated civic and cultural projects prohibitive in cost.

TESTIMONY OF RALPH G. CASO

The present County Executive, Ralph G. Caso, was called as a witness for the appellants (R. 458) at the trial.

Mr. Caso reaffirmed the fact that the County acquired the property at Mitchel Field for civic, educational and cultural purposes (R. 463) and that the County was proceeding with the construction of a central reference library which will serve all residents of the County (R. 463) and is developing an area for a recital hall to meet the cultural needs of the County (R. 464) to be located near the existing Coliseum. He further testified that a hotel, a park, a complex for the handicapped, a technical and trade high school, police precinct, bus facility and firehouse were being planned as part of the development (R. 464-465). An area known as Hempstead Plains was being retained in its natural state; provision was being made for senior citizen housing and for the construction of commercial and industrial development "to bring in ratables for that particular area". He added (R. 467) that a federal office complex and a County office complex were being planned and that land had been acquired by the Town of Hempstead for a recycling plant (R. 467).

All of these uses were the subject of favorable comments by each of the witnesses who were asked during the course of the trial as to whether allocation of the land for each of these specific purposes constituted a rational use of the land.

Obviously, Mr. Caso was placed upon the stand to explain why no provision had been made for the construction of family housing in the Mitchel Field area. Mr. Caso pointed out (R. 469) that the County does not have housing powers, that land was acquired for civic, cultural and educational purposes (R. 485) and was "never bought for housing." His testimony continued:

> "It was meant to take care of the needs of our County, which is a million and a half people, in the areas of public facilities as presently do not exist, and should belong in a central area, such as Mitchel Field." (R. 485)

Consistent with the testimony of other witnesses, Mr. Caso pointed out that Mitchel Field is not isolated and "is surrounded by residential communities." (R. 486)

Mr. Caso denied emphatically (R. 471) that a determination not to build houses was based upon any racial considerations. On the contrary, Mitchel Field was acquired for the civic, cultural and educational purposes designed to meet the needs of all the people of the County. It provided an opportunity to create a complex of civic structures in an area which became available in the geographical center of the County.

In response to the suggestion that his decision was based upon political pressure from the residents in the community, Mr. Caso pointed out (R. 526) that the communities were opposed to the massive development of public housing at Mitchel Field because of the impact it would have on the communities in terms of the tax burden, the need for schools, and congestion (526), and that there were other remedies available for the

solution of the housing problem, including his scattered-site plan (R. 527).

Again, Mr. Caso denied (R. 694) that the decision bore any relationship to the potential influx of racial minorities or that the concern of the neighborhood was racially motivated. It should be pointed out that the Uniondale community, in which most of Mitchel Field is located, is a racially integrated community, with a black residency far in excess of the County average.

Mr. Caso was asked on cross-examination whether his proposals for the development of the area were based upon any discriminatory attitude. The question and answer (R. 776) follow:

> "Q. Did you intend, by these proposals, to purposefully discriminate against any ethnic, racial or economic group?
>
> A. Absolutely not."

POINT I.

APPELLANTS HAVE FAILED TO ESTABLISH PROOF OF AN AGGRIEVED PLAINTIFF WITHIN THE CERTIFIED CLASS OR OF A "SUSPECT CLASS".

On May 18, 1973, the District Court issued a Memorandum and Order (87-A), certifying the class as:

> "All Black or Spanish-speaking persons residing or seeking to reside in said County and all persons residing or seeking to reside in said County who are eligible for low income housing is defined in state or federal statutes or regulations."

At the opening of the trial, appellee County objected to the certification of the class since it was an economic group and asked unsuccessfully for a dismissal of the action (R. 57-59).

In view of the law as enunciated in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the motion should have been granted, especially since appellants have not challenged and do not appear to challenge the claim of appellee County that there was a rational basis for its development of Mitchel Field.

In any event, appellants:

(a) introduced no evidence as to non-residents who are of the minority or majority groups and who "seek to reside in Nassau County", and appellants seem to have abandoned this portion of the class;

(b) did not produce a single person who testified that he or she was living in overcrowded or substandard housing and required the relief sought in this action. The only individual appellant who took the stand testified that the condition of her housing was "A. Liveable, good. Good." (R. 1079).

No single reference is made to her testimony in appellants' 64-page brief in this appeal;

(c) have failed to establish through the organizational appellants that any of their members needed housing at Mitchel Field, or were the subjects of an exclusionary housing policy within the County. While a representative of the NAACP did testify, he himself lives in a two-family home in Hempstead which he owns, on an integrated street in which there is no hostility between the black families or the white families (R. 287).

The insufficiency of the testimony of the NAACP is demonstrated by the fact that appellants did not even include that testimony in their appendix nor refer to it in their brief.

Appellant, The Baldwin Council for Human Rights, did not testify.

Obviously, the mere interest of the NAACP in the housing problem does not give them standing. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

In the *Sierra* case, the Supreme Court wrote:

> "But a mere 'interest in a problem' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or aggrieved."

There is no special circumstance in this case, no threat to the activity of this organization warranting a departure from the general

rule that they must show a distinct injury. *National Welfare Rights Organization v. Wyman*, 304 F. Supp. 1346 (E.D.N.Y. 1969).

Appellee County respectfully urges that none of the other proof in this case supplies this missing link of proof of an aggrieved party plaintiff.

It must be noted here that even if a class had been certified prior to commencement of the trial, the loss of standing of the only champion remaining in the class, by reason of the utter failure of proof, would render the litigation moot. *Geraci v. Treuchtlinger*, 487 F. 2d 590 (2d Cir. 1973); *Lecci v. Cahn*, ____ F. 2d ____ (decided February 25, 1974, 2d Cir.).

In *Lawrence v. Oakes*, 361 F. Supp. 432, a three-judge District Court, (Waterman, *Circuit Judge)* rejected a request that poor persons who are denied participation in federally assisted low income housing programs because of a local approval requirement should be viewed as a "suspect class". The Court relied upon *Lindsey v. Normet*, 405 U.S. 56 (1972), *James v. Valtierra*, 402 U.S. 137 (1971), and the *Rodriguez* case.

POINT II.

NO VIOLATION OF THE FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE WAS PROVEN. APPELLANTS HAVE NOT BEEN DISCRIMINATED AGAINST RACIALLY OR ECONOMICALLY.

Appellants in this action have steadfastly asserted that there is a constitutional right to housing, or to housing of a certain type or quality and that the appellees, by not providing multi-family housing at Mitchel Field for the members of the classes which they alleged they represented, have discriminated against those classes and denied them their constitutional rights. There is no such constitutional or fundamental right to housing. *Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed. 2d 36 (1972).

The cases relied upon by the appellants to provide a nexus between themselves and the federal law do not stand for the proposition that there is a constitutional right to housing. One such case is *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d 920 (2d Cir. 1968). In that case, the plaintiffs were removed from a redevelopment area by the defendant agency and were not assisted in relocating either in the redevelopment area or within the same community. Plaintiffs complained that the agency was practicing "urban removal and not urban renewal." The court held that persons displaced by an urban renewal project were entitled to be relocated within the urban renewal area or within the same community. The case involved action of the municipality in direct contravention of the rights of the inhabitants to be relocated in the new project. Clearly, then, this case is distinguishable on the facts because appellees

in the instant case have not removed nor excluded anyone from housing at Mitchel Field. The other cases cited by the plaintiffs also involve municipal authorities acting, or not acting (as in *Norwalk CORE*) within their legal power and as part of their legal obligation in a specifically calculated program to bar blacks from the communities involved.

In *Kennedy Park Homes Association v. City of Lackawanna*, 318 F. Supp. 669 (W.D.N.Y. 1970), *aff'd*, 436 F. 2d 108 (2d Cir. 1970), *cert. den.*, 401 U.S. 1010 (1971), a case upon which the appellants have been relying quite heavilly all throughout the trial, the Mayor of Lackawanna, New York, refused to sign sanitary form #5, a requirement for any development within that city. The alleged basis of this refusal was that there was a sewage and drainage problem in the area. It was shown, however, that the Mayor was prepared to sign sanitary form #5 for other projects in the area. The development in question would have been low-income housing, the others were not. Therefore, the refusal to sign the form effectively blocked the development of low-income housing, for which there was a developer who owned land and was prepared to build upon it. The execution of sanitary form #5 was within the power of and part of the duties of the defendant. In the instant case, there is no refusal to perform a ministerial act for the purpose of excluding a racial minority. There is no developer who is prepared to build but cannot because of the deliberate action or inaction of the County which is preventing him from doing so. Clearly, then, this case upon which the appellants place so much reliance is distinguishable on its facts.

In fact, in the *Lackawanna* case, this Court spoke of the "property rights" of plaintiffs, and with regard to "property rights", the Court, in *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701, 33 L. Ed. 548 (1972), stated as follows:

> "Certain attributes of 'property' interests protected by procedural due process emerge from (the Court's) decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."

It is clear that the only individual appellant who testified here did not even show an expectation. She only showed an abstract desire. Therefore, no case has been made here by appellants to bring this case under the *Lackawanna* case.

Another of the cases which the appellants stress as being dispositive of this case is *Dailey v. City of Lawton, Okla.*, 296 F. Supp. 266 (W.D. Okla. 1969), 425 F. 2d 1037 (10th Cir. 1970). In this case, a developer also owned land on which it wished to develop low-income housing. The land had originally been zoned R-4 high density residential. It was rezoned P-F, public facility, becoming the only land so zoned in the area, all other land in the area (with minor exceptions) being still zoned R-4. When the purchaser who proposed to build low-income housing on the site applied for a change of zoning back to R-4, his application was denied. This denial was despite the fact that the former and present directors of the Planning Commission testified that there was no reason why the parcel in question should not be rezoned to

the original R-4. No such application was made here, this case being inapposite to *Dailey*.

In *Parkview Heights Corp. v. The City of Black Jack*, 467 F. 2d 1208, a developer purchased land in an unincorporated area with the intention of developing low-income housing. The local residents, upon hearing of the project, succeeded in incorporating the area and immediately enacting a zoning ordinance which banned further multi-residence construction.

Each of these cases cited by appellants alleged that the defendants were acting or refusing to act within the scope of their delegated power to achieve a discriminatory result. None of these cases alleged that executive or legislative planning is a function of the court. The court in each case merely took a discriminatory fact situation in which there were "purposeful acts" of discrimination and directed an appropriate remedy. No such showing was made in this case.

In *Banks v. Perk*, 341 F. Supp. 1175, another case upon which the appellants rely, the situation is again distinguishable from the case at bar. In the *Banks* case, building permits had been issued for the construction of public housing units outside the area of Negro concentration of the City of Cleveland. The court found that Cleveland was a racially divided city with 96% of the Negro population living on the east side of the Cayuhaga River. The building permits were revoked by the city administration with an announcement that "a new town in town" project would be created in the Negro neighborhoods of the east side of

There is clearly no right to housing or a right to have housing planned. The United States Supreme Court, in *Lindsey v. Normet, supra,* stated:

> "We do not denigrate the importance of decent, safe and sanitary housing. But the constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality ... " 31 L. Ed. 2d at 51.

In a recent case where a three-judge constitutional court had been convened in the Northern District of Ohio, *Mahley v. CMHA; Harrison v. CMHA,* 355 F. Supp. 1245 (1973), the court considered the question of whether there is a fundamental right to housing outside the inner city. Circuit Judge Battisti, writing the opinion of the court, said at page 1250:

> "Those rights which have been characterized as fundamental are quite few. To date, the right asserted here has not been elevated to the level of a fundamental right. However, simply categorizing housing as a basic human need is not sufficient to call for application of strict judicial review outside of the carefully designed parameters which the Supreme Court has set for fundamental rights."

In *Lindsey v. Normet, supra,* the Supreme Court, in addition to declaring that there was no constitutional right to housing, made the following comment:

> "Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships is a legislative and not a judicial function." 31 L. Ed. 2d 51.

Cleveland. The effect of this, of course, would be to further concentrate and separate the Negro population of Cleveland. This again was construed as a discriminatory act directed at a particular project involving a racial minority.

In the case at bar, there were only a variety of suggestions that housing of some kind be created at Mitchel Field. No concrete plans were put forth, no financing arranged by anyone, and no building permits were applied for or issued. The testimony at trial was that Nassau County was not, as was Cleveland, racially divided, but, rather, was an integrated community.

It is of great importance to note that none of these or any other cases relied upon by the appellants hold that a municipality must develop land which it owns for low-income housing, or formulate plans for the development of such land so as to provide for such housing or develop a master plan. Even if the County appellees had housing powers, which they do not, there would be no duty to build or plan for housing. The California Supreme Court, in a housing case, affirmed by the United States Supreme Court, stated:

> "The equal protection clause, and in fact the whole of the 14th Amendment, is prohibiting in nature and we are not prepared to hold, as has been urged, that it has been or should be construed to impose upon the state an obligation to take positive action in an area where it is not otherwise committed to act." *Mulkey v. Reitman*, 415 P. 2d 825, *aff'd*, 387 U.S. 369, 18 L. Ed. 2d 832 (1967).

In the instant case, no appellant nor witness for the appellants came forward and testified that he or she had sought low-income public housing and found it unavailable. The failure of such proof, and the appellants' failure to sustain their burden make the decision of the Court below sound in this regard.

The appellants' theory of the case was that there is a right to housing, and that the appellees' failure to plan for, build or lease the land for said housing constituted a violation of appellants' right to housing. The appellants, therefore, alleged that appellee County had violated appellants' right to equal protection of the law.

The main thrust of the Fourteenth Amendment Equal Protection Clause had been to prevent arbitrary, unreasonable, invidious discriminations. The vast majority of cases have dealt with situations in which a state or agency of the state has passed a statute or enforced a statute or otherwise acted in such a manner as to create a "classification". The courts have then examined the classifications created to see (1) whether they are reasonable in light of the purpose for which they were created (the test for arbitrariness) and (2) whether the law applies equally to those whom it affects (the test for invidious discrimination). These tests are not invoked until the court determines that there is an interference with a protected right. Here, no right has been affected because there is no right to housing.

If a right is interfered with, the Court places the burden of prima facie proving arbitrariness and discrimination upon the plaintiff,

before shifting the burden to the defendant to prove a rational basis or a compelling state interest for the action. The testimony in this case has shown that the defendants never created a "classification" by their decision to exclude housing because all family housing, for all income levels, was excluded. The sole classification in this case is created by the appellants in creating a class alleged to be aggrieved, where, in fact, no witness offered proof that he was aggrieved.

The law is clearly stated:

> "Only if a state deprives any person or denies him enforcement of his right guaranteed by the 14th Amendment can its protection be invoked." *Rice v. Sioux City Memorial Park Cemetery*, 75 S. Ct. 614, 349 U.S. 70, 99 L. Ed. 897 (1954).

The appellants allege, amongst their many claims, that the County of Nassau is practicing economic discrimination by the proposed development of Mitchel Field, in that there is a greater adverse effect on the poor. In *James v. Valtierra*, 402 U.S. 137, 28 L. Ed. 2d 678, 91 S. Ct. 1331, the court held that laws which disadvantage the poor do not necessarily violate the Constitution.

Here, we do not have a situation where a law has been enacted or an action has been taken which is aimed specifically at the poor. On the contrary, the decision made was to eliminate all family housing at Mitchel Field, not just the housing for the poor. The various recommendations have all recommended a mix in the family housing between low income, moderate income and high income. The formula almost universally accepted in New York State is 70% moderate and high income, 20% low income and

10% senior citizen, the low, high and moderate income housing being classified as family housing.

The cases that have found economic discrimination to be actionable provided a remedy only in those instances where there is a fundamental right, such as the right to appeal a criminal conviction, from which the poor are effectively barred by the inability to pay state imposed costs.

The failure of appellants to show discrimination on the part of County appellees did not place the burden on said appellees to come forward and show a compelling state interest.

In all the cases relied upon by appellants, there was proof that the plaintiffs had been the victims of discrimination. There is no such showing in this case. Therefore, the rational basis test is the only test to be applied here, although the County, if required, could meet a more stringent test. The testimony and evidence at trial amply proved that the uses presently proposed by the appellee County were rational. In fact, appellants do not appear to contest this point. There has been no showing of invidious discrimination by appellee County.

POINT III.

THE COUNTY LACKS THE LEGAL POWER TO CONSTRUCT HOUSING.

In essence, the appellants' position is that Mitchel Field is owned by the County, that there is a housing shortage, and that Nassau County should therefore plan housing at Mitchel Field. The relief sought must be viewed against the prohibition that counties in New York State may not construct housing. A county is the creature of the state and enjoys only such powers as are delegated to it by the state, which is the repository of the sovereign power.

Article XVIII of the Constitution of the State of New York is the State's housing policy and basic housing law. It is limited by its express language to "any city, town or village or public corporation".

Section 2 of Article XVIII specifically excludes a county from its provisions:

> *"As used in this article, the term 'public corporation' shall mean any corporate governmental agency (except a county or municipal corporation) organized pursuant to law to accomplish any or all of the purposes specified in this article."*
> (Emphasis supplied.)

It is to be noted that the final paragraph of Section 2 removes counties from the agencies given housing powers.

The Public Housing Law of the State of New York defines, in Section 3(5), "municipal corporation" and "municipality" as a city, town or village. Article 15 of the General Municipal Law of New York

is the state's Urban Renewal Program. Section 502 contains the definitions to be used in that law and reads, in part, as follows:

> "Sec. 502. Definitions
> As used in this article and article fifteen-A
> of this chapter, the following terms shall mean:
>
> * * * *
>
> "2. 'Municipality.' A city, town or village."

Clearly, in New York State, it is not intended by the legislature that counties have housing powers, as all references in the law of New York which deal with housing refer to cities, villages and towns only. Furthermore, Section 31 of the Public Housing Law provides that there be no overlapping of jurisdiction when it gives jurisdiction to town housing authorities to encompass all of the town except villages, even if the villages have no housing authority. A county has no territorial areas over which it has sole jurisdiction; therefore, if a county were to have housing powers, it would be in conflict with the powers of a town or village or city, clearly to the contrary of the intent of the legislature that there be no such overlapping jurisdiction.

In the general election of November 2, 1971, a proposed amendment, known as Amendment No. 1, was submitted to the voters of the State of New York. This proposed amendment would have changed Article XVIII, Sec. 2 of the Constitution of the State of New York so as to grant to counties low-income housing powers. This amendment was defeated at the polls by the voters of the state, so that

the County of Nassau, along with all other counties in the state, still has no housing powers. This proposal to the voters has relevance to the case of *James v. Valtierra*, 402 U.S. 137, 28 L. Ed. 2d 678, 91 S. Ct. 1331 (1971), to which further reference will be made in this memorandum.

POINT IV.

THE COUNTY IS MEETING ITS MORAL OBLIGATION TO ENCOURAGE THE DEVELOPMENT OF HOUSING FOR ALL ECONOMIC GROUPS.

Although, as has been shown in Point III of this brief, it is undisputed that under the laws of the State of New York the County of Nassau, like all other counties, does not have housing powers, the County has not shown a disinterest in housing problems. A less concerned administration might have merely shrugged off the problem with the simplistic answer that, "We do not have housing power, so we can't do anything about the problem." This, however, has not been the approach of the County of Nassau in the present administration, which has moved constructively in this area with the creation of the position of Housing Coordinator in the County Executive's office. This post was created for the first time (902) in the history of the County by the County Executive, Ralph G. Caso, on January 1, 1971. Mr. Caso appointed Mr. Ray Malone to this post (R. 857). In choosing Mr. Malone, Mr. Caso brought to this newly created post a man of vast experience in the area of housing. He had been for many years Chairman of the Town of Hempstead Housing Authority and as such, was responsible for creating most, if not all, of the public housing in the Town. Mr. Malone is intimately familiar with the various programs of the Department of Housing And Urban Development from the practical side of having worked with and implemented their programs in the Town.

Despite the fact that the County has no housing powers, Mr. Malone has been extremely effective in his position. He and his staff have made themselves and their expertise available to the towns, villages and cities in the County, who have the housing power in the County, to assist them in their housing programs. (R. 879, 902). He has aided them in obtaining Federal funding for their projects, in removing various obstacles blocking the implementation of their programs. Mr. Malone has appeared constantly before local citizens' groups in all areas of the County to explain various planned projects and programs in an effort to encourage community support for these projects. (R. 884)

Mr. Malone and his staff have also cooperated with private developers who desired to develop housing within the County. His work with these private developers has, in the main, been the same as with the governmental agencies -- namely, helping to obtain Federal funding and mortgaging and to create a favorable community attitude toward the planned projects.

The County has not limited itself in the housing area solely to the activities of Mr. Malone; there are other areas in which the County is operating. The County has actively aided the towns, villages and cities in their code enforcement programs to enable these governmental units, whose direct responsibility it is, to root out and correct substandard housing conditions within their jurisdiction. (R. 892)

The County's Department of Social Services aids the localities with a rent withhold program, whereby rent paid by the Department for recipients of assistance is withheld when the local building departments find the dwellings to be in violation of building codes. (R. 552) This procedure "encourages" landlords of dwellings occupied by recipients of assistance to correct the violations and maintain their properties in such a manner as not to slip into the substandard class.

Finally, but certainly not of the least importance in the County's housing program, is its Open Housing Law. Realizing the importance of all of the residents of the County being able to have access to safe, decent standard housing, and its obligation to assist in whatever manner it was able to under the powers which it held, the County in 1969 adopted Local Law No. 4 of that year, which is the County's Open Housing Act. The policy of the County in this regard is clearly set forth in Section 21-9.7(a) of the Administrative Code of Nassau County (Open Housing Law), which is quoted verbatim in the opinion of the Court at page 16.

The purpose of the law is, of course, to prevent discrimination in the sale or rental of housing accommodations within the County. Clearly, therefore, despite the fact that the County has no power to develop housing on its own initiative, it is doing many things within the

powers that it does have to encourage the development of housing within the County, to eliminate to as great an extent as possible substandard housing, and to insure free access to all housing by all the inhabitants of the County free from discrimination on the part of any who, being in control of said housing, would discriminate.

POINT V.

THE FEDERAL FAIR HOUSING LAW IS NOT APPLICABLE TO THE PLANNING OF ZONING IN AN AREA OF THE COUNTY, BUT APPLIES TO THE DISCRIMINATORY EFFECTS IN THE INSPECTION, SALE OR RENTAL OF AN EXISTING DWELLING.

The 1968 Civil Rights Act, Federal Fair Housing Law, prohibits a number of discriminatory practices in the sale, rental, financing or brokerage of housing; and provides, with respect to such practices, an enforcement machinery. *Shannon v. United States Dept. of Housing & Urban Development*, 463 F. 2d 809; *Otero v. New York City Housing Authority*, 484 F. 2d 1122; *Kennedy Park Homes Ass'n v. City of Lackawanna*, 318 F. Supp 669; *Sisters of Providence of St. Mary of the Woods v. City of Evanston*, 335 F. Supp. 396.

Specifically, 42 U.S.C. §3604 lists the indices of discrimination in such sale, rental, financing or brokerage of housing. Section 3608(d)(5) gives the administrator (the Secretary of HUD) the duty to take affirmative action to remedy the violations of section 3604.

Appellants urge that the Federal Fair Housing Law places the duty upon the County of Nassau to institute low income housing plans for Mitchel Field. This is completely untenable, even under the most liberal interpretations of the statute, and by all reported cases.

Appellants state that the Supreme Court and this Circuit both have recently adopted a broad view of the scope of the Fair Housing Law. They cite two cases in support of this position, *Trafficanto v. Metropolitan Life Ins. Co.*, 93 S. Ct. 364, and *Otero v. New York City*

Housing Authority, supra, from the latter of which they quote. Yet, it is important that a distinction be made in the syllogism drawn between these two cases, and the case at bar.

In the case at bar, the County of Nassau has never taken anyaction to deny minorities access to decent housing nor has it promoted racial residential segregation. In fact, it enacted and enforces an Open Housing Law quoted in the opinion of Judge Mark A. Costantino.

Appellants interpret the words, "scope of the affirmative obligation of municipal officials to achieve integration in housing" as enlarging the duties of the County to create housing rather than to promote a fair housing policy. In *Gaufreaux v. Chicago Housing Authority,* 296 F. Supp. 907, *aff'd,* 436 F. 2d 306 (7th Cir. 1970), *cert. den.*, 402 U.S. 922 (1971), the Court held that a tenant assignment policy which assigns persons to a particular project because of the concentration of persons of his own race already residing at the project has been prohibited. Interestingly, it is this assignment policy of tenants that appellants are describing in their quote from *Otero, supra,* at 1133. Clearly, the Fair Housing Law applies to such a situation since the assignment method in question is considered as an unfair renting practice under 42 U.S.C. 3604. But the present case does not involve any renting or selling of housing, but a demand to construct new housing where none existed before.

The *Otero* case cited by appellants does not support their

position. In *Otero*, the allegation was that the Authority was discriminating in the rental of a housing project by denying former occupants the right to possession of apartments in the new project in an effort to avoid a mono-racial complex.

As previously mentioned, 42 U.S.C. 3608(d)(5) prescribes a duty of affirmative action on the Secretary of HUD in a 42 U.S.C. 3604 violation such as a discriminatory renting practice. This may be seen in the court's statement in *Otero, supra,* at 1133, that "Not only may such practices be enjoined, but affirmative action to erase the effects of past discrimination and desegregate housing patterns may be ordered." (emphasis supplied). It is clear that the "practices" spoken of are the violations of 42 U.S.C. 3604 in the discriminatory renting, selling, financing, or brokerage of housing. The affirmative actions required are not, as appellants imply, the duty of the County of Nassau to build low income housing at Mitchel Field when the alleged duty is not even within the powers given to the County by the State Constitution.

The *Trafficante* case, *supra,* cited by appellants, deals with a renting situation and not a situation at all analogous to the one at bar. There, it was decided that one could sue under the Fair Housing Law, 42 U.S.C. 3610 to protest alleged racial discrimination against nonwhites in the rental of apartments in which they were already tenants.

Finally, appellants mention cases in which the Fair Housing Law of 1968 was applicable to support their contention that there should be forced on the County a mandate of low-income housing in Mitchel Field. The first case, *Shannon v. HUD, supra*, involved a fact situation in which HUD approved a change from an urban renewal plan which contemplated ownership of dwellings to one which contemplated a rental of dwellings. In mentioning the affirmative action duty on the HUD Secretary (42 U.S.C. 3608 (d)(5), the Court stated that this duty applies to HUD's own programs and activities with respect to such rental plan. This is not applicable to the instant case where there are no proposed rentals or ownerships. In *Blackshear Residents Organization v. Housing Authority of City of Austin*, 347 F. Supp. 1138, the city housing authority allegedly planned to construct a public housing project that would perpetrate a segregated community by using a discriminatory tenant admission rental system. Again, here the County has not engaged in such action.

Shannon v. HUD, supra, and *Blackshear Residents Organization v. Housing Authority of City of Austin,* 347 F. Supp. 1138, cited by appellants, are also inapplicable. *Shannon* merely held that the Federal Fair Housing Law applied to HUD's own programs and activities. *Blackshear* related to a case in which a city housing authority planned to construct a public housing project which would create a segregated community by reason of a discriminatory tenant admission rental system.

POINT VI.

CONSTITUTIONAL RESTRICTIONS PRECLUDE
THE RELIEF SOUGHT BY THE APPELLANTS

The County lacks housing power (Point III of this brief), and a proposal to amend the New York State Constitution for granting powers was defeated in a statewide referendum in 1971.

The defeat at the polls seemed conclusive in view of the decision of the United States Supreme Court in the *Valtierra* case.

It is respectfully submitted that this Court may not direct the County to perform an unconstitutional act, to wit, construct housing. The alternative would be to direct the County to alienate the property by sale or long term lease; but this would involve a preemption of the legislative powers granted to the Board of Supervisors of Nassau County by Section 11-8.0 of the Nassau County Administrative Code.

Another alternative would be to hold all of the property as ransom by restraining development until some action is taken with respect to housing. This would involve a denial to Nassau County residents of their right to a civic, educational and cultural center and to park and industrial areas for which the land was acquired and would involve the County in the very serious problem of escalating costs.

In the absence of purposeful discrimination, should this Court exercise any of the foregoing powers? It is respectfully submitted that upon this record the answer should be "no", and that the decision of the lower court should be affirmed.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ABDON ACEVEDO, et al., :

No. 74-1235

Appellants, :

- against - : CERTIFICATE OF SERVICE

NASSAU COUNTY, et al., :

Appellees. :

----------x

This is to certify that two copies of Appellee Nassau County's brief and appendix were served on counsel for appellants and on counsel for appellee Town of Hempstead and counsel for appellee Federal Government as follows:

Service on Richard F. Bellman, counsel for appellants was accomplished by hand-delivering said copies by agreement upon Mr. Bellman at the Court Clerk's office, ~~or if not then by leaving~~ Service on ~~Same~~ with the Albert Leone, attorney for appellee Town of Hempstead, was made by hand-delivering same to him. Service on Cyril Hyman, attorney for Federal appellees was made by leaving said copies with ~~the Court Clerk to be picked up by Mr. Hyman's messenger~~ him personally.

Dated: March 6, 1974

Natale A. Fedone

Senior Deputy County Attorney